

THE DELAYS OF THE LAW

The chief reason why the State devotes so much time and effort to the administration of justice is to promote the cause of peace and tranquility in the community. Speaking theoretically and ideally of course, our aim is to secure equal and exact justice; but practically, the object sought is peace.

The most recent instance of this was set forth most succinctly and forcibly in the able report of Governor Montague as to the progress in the establishment of a permanent tribunal at The Hague to settle international difficulties. While in theory this is to secure exact justice between the nations, practically its purpose is to avoid war.

In a republic like ours, under popular control, with the dual form of government between the States and the United States, politico-legal questions which might tend to bring on conflict between parties and factions among the people, were, first, the distribution of power under the federal constitution between the national government and the State governments; second, the division between the executive, the legislative and the judicial branches of the government; and, third, the limitations upon governmental action either through the national government or the State government, in respect to the rights of individuals. Under our fundamental compact and its subsequent construction by the judicial branch, there was introduced a new and most effective instrument for the promotion of the peaceable settlement of these great governmental political controversies. The decisions in the cases of *Marbury v. Madison*, and *Cohen v. Virginia*, which in their personal aspect took on the phase of a fundamental difference of opinion between two great Virginians, established the principle in this country, which has never been departed from, that the ultimate arbiter in respect to such great political and legal issues was and is the Supreme Court of the United States. It is true that this unique feature did not save us from the greatest civil war of modern times; but no one at all familiar with the history of the country can deny that this function of the Supreme Court of the United States, and a similar one within the

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sphere of their jurisdiction, of the Supreme Courts of the States ultimately to decide upon the limitations of legislative and executive power, have greatly contributed to the peace and tranquility of our community. This peculiar power of courts with us has carried their usefulness for the peaceful settlement of controversies beyond anything attempted in other countries. Of course, the exercise of this power must rest on the existence of a written constitution. Without it, there would be no guide for the courts except indefinite traditions that could hardly be made the basis for judicial decision. The power of the courts to declare invalid laws of the legislature we know was not adopted without very bitter opposition; but I think the controversy was settled now so long ago that we generally agree that it has much contributed to the smooth working of our constitution and to the supremacy of law and order in our community and offers great advantages over the methods of settling a similar class of questions in other countries.

While we may properly felicitate ourselves on this widened function of our courts, enabling us to avoid less peaceable methods of settling important politico-legal questions, have we the right to say that our present administration of justice generally insures continued popular satisfaction with its results? I think not. It may be true that down to the present time, it has supplied a means of settling controversies between individuals and of bringing to punishment those who offend against the criminal laws sufficient to prevent a general disturbance of the peace and to keep the dissatisfied from violent manifestation against the government and our present social system.

There are, however, abundant evidences that the prosecution of criminals has not been certain and thorough to the point of preventing popular protest. The existence of lynching in many parts of the country is directly traceable to this lack of uniformity and thoroughness in the enforcement of our criminal laws. This is a defect which must be remedied or it will ultimately destroy the republic.

I shall not delay you this morning, however, with a discussion as to the reforms which ought to be adopted in the criminal branch of our jurisprudence. I have attempted this in an address on another occasion. I wish to confine myself to the delays and inequalities in the administration of justice in controversies between private persons, including, of course, corporations.

The present is a time when all our institutions are being subjected to close scrutiny with a view to the determination whether we have not now tried the institutions upon which modern society rests to the point of proving that some of them should be radically changed. The chief attack is on the institution of private property and is based upon the inequalities in the distribution of wealth and of human happiness that are apparent in our present system. As I have had occasion in other places to say frequently, I believe that, among human institutions, that of private property, next to personal liberty, has had most to do with the uplifting and the physical and moral improvement of the whole human race, but that it is not inconsistent with the rights of private property to impose limitations upon its uses for unlawful purposes, and that this is the remedy for reform rather than the abolition of the institution itself. But this scrutiny of our institutions, this increasing disposition to try experiments, to see whether there is not some method by which human happiness may be more equally distributed than it is, ought to make those of us who really believe in our institutions as essential to further progress, anxious to remove real and just grounds for criticism in our present system.

I venture to think that one evil which has not attracted the attention of the community at large, but which is likely to grow in importance, as the inequality between the poor and the rich in our civilization is studied, is in the delays in the administration of justice between individuals. As between two wealthy corporations, or two wealthy individual litigants, where the subject matter of the litigation reaches to tens and hundreds of thousands of dollars, where each party litigant is able to pay the expenses of litigation, large fees to counsel and to undergo for the time being the loss of interest on the capital involved, our present system, while not perfect, is not so far from proper results as to call for anxiety. The judges of the country, both state and national, are good men. Venality in our judges is very rare; and while the standard of judicial ability may not always be as high as we should like to see it, the provisions for review and for free and impartial hearing are such as generally to give just, final judgments. The inequality that exists in our present administration of justice, and that sooner or later is certain to rise and trouble us, and to call for popular condemnation and reform, is in the unequal burden which the delays and

expenses of litigation under our system impose on the poor litigant. In some communities I know, delays in litigation have induced merchants and commercial men to avoid courts altogether and to settle their controversies by arbitration, and to this extent the courts have been relieved; but such boards of arbitration are only possible as between those litigants that are members of the same commercial body, and are in a sense associates. They offer no relief to the litigant of little means who finds himself engaged in a controversy with a wealthy opponent, whether individual or corporation.

The reform, if it is to come, must be reached through the improvement in our judicial procedure. In the first place, the codes of procedure are generally much too elaborate. It is possible to have a code of procedure simple and effective. This is shown by the present procedure in the English courts, most of which is framed by rules of court. The code of the State of New York is staggering in the number of its sections. A similar defect exists in some civil law countries. The elaborate Spanish code of procedure that we found in the Philippines when we first went there could be used by a dilatory defendant to keep the plaintiff stamping in the vestibule of justice until time had made justice impossible. Every additional technicality, every additional rule of procedure adds to the expense of litigation. It is inevitable that with an elaborate code, the expense of a suit involving a small sum is in proportion far greater than that involving a large sum. Hence it results that cost of justice to the poor is always greater than it is to the rich, assuming that the poor are more often interested in small cases than the rich in large ones—a fairly reasonable assumption.

I listened with much pleasure to the discussion yesterday in respect to the proposed amendment to your procedure in Virginia, and I was reminded of a discussion of the same subject by that great lawyer, Mr. James C. Carter of New York. He was the leader of the opposition to the New York code, and had to meet Mr. David Dudley Field, who was its chief supporter. Mr. Carter impressed me with having in that particular discussion the better side. He showed that under the Massachusetts procedure, which is, I fancy, not unlike yours in Virginia, to wit, a retention of the common law forms of action, together with the division between law and equity, with modifications to dispense with the old technical niceties of common law and equity plead-

ing, the decisions on questions of practice and pleading in Massachusetts were not one-tenth of those arising under the code of New York, and his argument was a fairly strong one in support of the contention which I heard here yesterday, that it was better to retain the old system and avoid its evils by amendment than to attempt a complete reform. However, it is to be said that a study of the English system consisting of a few general principles laid down in the practice act, and supplemented by rules of court to be adopted by the High Court of Judicature, has worked with great benefit to the litigant, and has secured much expedition in the settlement of controversies and has practically eliminated the discussion of points of practice and pleading in the appellate courts. My impression is that if the judges of the court of last resort were charged with the responsibility within general lines defined by the legislature for providing a system in which the hearings on appeal should be as far as possible with respect to the merits and not with respect to procedure, and which should make for expedition, they are about as well qualified to do this as anybody to whom the matter can be delegated.

This system of delegating questions of procedure to courts has a precedent of long standing in the Supreme Court of the United States, for under the Federal statutes that court has to frame the rules of equity to govern procedure in equity in the Federal courts of first instance. I may say incidentally that with deference to that great court, it has not given particular attention to the simplification of equity procedure and to the speeding of litigation in Federal courts which might well be brought about by a radical change in the rules of equity prescribed by it. It may be and probably is the fact that under the constitutional provision, Congress could not do away with the separation of law and equity cases as has been done in the codes of many of the States. I regret this because such a change makes for simplicity and expedition in the settlement of judicial controversies. It is clear, however, that the old equity practice could be greatly simplified. It has been done in England, and it ought to be done in the Federal courts.

One reason for delay in the lower courts is the disposition of judges to wait an undue length of time in the writing of their opinions or judgments. I speak with confidence on this point, for I have been one of the sinners myself. In English courts, the ordinary practice is for the judge to deliver judgment imme-

diately upon the close of the argument, and this is the practice that ought to be enforced as far as possible in our courts of first instance. It is almost of as much importance that the court of first instance should decide promptly as that it should decide right. If judges had to do so, they would become much more attentive to the argument during its presentation and much more likely on the whole to decide right when the evidence and arguments are fresh in their mind. In the Philippines we have adopted the system of refusing a judge his regular monthly stipend unless he can file a certificate, with his receipt for his salary, in which he certifies on honor that he has disposed of all the business submitted to him within the previous sixty days. This has had a marvelously good effect in keeping the dockets of the court clear.

It may be asserted as a general proposition, to which many legislatures seem to be oblivious, that everything which tends to prolong or delay litigation between individuals, or between individuals and corporations, is a great advantage for that litigant who has the longer purse. The man whose all is involved in the decision of the lawsuit is much prejudiced in a fight through the courts, if his opponent is able, by reason of his means, to prolong the litigation and keep him for years out of what really belongs to him. The wealthy defendant can almost always secure a compromise or yielding of lawful rights because of the necessities of the poor plaintiff. Many people who give the subject hasty consideration regard the system of appeals, by which a suit can be brought in a justice of the peace court and carried through the other courts to the Supreme Court, as the acme of human wisdom. The question is asked: "Shall the poor man be denied the opportunity to have his case re-examined in the highest tribunal in the land?" Generally the argument has been successful. In truth, there is nothing which is so detrimental to the interests of the poor man as the right which, if given to him, must be given to the other and wealthier party, of carrying the litigation to the court of last resort, which generally means two, three and four years of litigation. Could any greater opportunity be put in the hands of powerful corporations to fight off just claims, to defeat, injure or modify the legal rights of poor litigants, than to hold these litigants off from what is their just due by a lawsuit for such a period, with all the legal expenses incident to such a controversy? Every change of procedure that limits the right of appeal works for the benefit in the end of the poor litigant and puts him more on an equality with a wealthy opponent. It is

probably true that the disposition of the litigation in the end is more likely to be just when three tribunals have passed upon it than when only one or two have settled it; but the injustice which meantime has been done by the delay to the party originally entitled to the judgment generally exceeds the advantage that he has had in ultimately winning the case. Generally in every system of courts there is a court of first instance, an intermediate court of appeals and a court of last resort. The court of first instance and the intermediate appellate court should be for the purpose of finally disposing in a just and prompt way of all controversies between litigants. So far as the litigant is concerned, one appeal is all that he should be entitled to. The community at large is not interested in his having more than one. The function of the court of last resort should not primarily be for the purpose of securing a second review or appeal to the particular litigants whose case is carried to that court. It is true that the court can only act in concrete cases between particular litigants, and so incidentally it does furnish another view to the litigants, in that case; but the real reason for granting the review should be to enable the Supreme Court to lay down general principles of law for the benefit and guidance of the community at large. Therefore, the appellate jurisdiction of the court of last resort should be limited to those cases which are typical and which give to it in its judgment an opportunity to cover the whole field of the law. This may be done by limiting the cases within its cognizance to those involving a large sum of money, or to the construction of the Constitution of the United States or the States or their statutes. The great body of the litigation which it is important to dispose of, to end the particular controversies, should be confined to the courts of first instance and the intermediate appellate courts. It is better that the cases be all decided promptly, even if a few are wrongly decided.

In our Supreme Courts the business is disposed of with perhaps as great promptness as is consistent with the purpose of their jurisdiction. The criticism that courts of last resort are too much given to technicality has, I believe, some merit in it. Codes might be drawn, however, giving the courts of review more discretion in this matter than they now have by requiring the party complaining of an error in the trial court to show affirmatively that the result would have been different if the error had not been committed. The difference in importance between an error in the hurly-burly of the actual trial and in the calm of a court of review

under the urgent argument of counsel for plaintiff in error and the microscopic vision of an analytical but technical mind on the Supreme Bench is very great.

The complaints that the courts are made for the rich and not for the poor have no foundation in fact in the attitude of the courts upon the merits of any controversy which may come before them, for the judges of this country are as free from prejudice in this respect as it is possible to be. But the inevitable effect of the delays incident to the machinery now required in the settlement of controversies in judicial tribunals is to oppress and put at a disadvantage the poor litigant and give great advantage to his wealthy opponent. I do not mean to say that it is possible, humanly speaking, to put them on an exact equality in regard to litigation; but it is certainly possible to reduce greatly the disadvantage under which the man of little means labors in vindicating or defending his rights in court under the existing system, and courts and legislatures could devote themselves to no higher purpose than the elimination from the present system of those of its provisions which tend to prolong the time in which judicial controversies are disposed of.

The shortening of the time will reduce the expense, because, first, the fees of the lawyers must be less if the time taken is not so great. Second, the incidental court fees and costs would be less.

Again, I believe that a great reform might be effected, certainly in the Federal courts, and I think too in the State courts, by a mandatory reduction of the court costs and fees. In the interest of public economy we have generally adopted a fee system by which the officers of the courts are paid. Human nature has operated as it might have been expected to operate, and the court officers, the clerk and the marshal, have not failed, especially in the Federal courts, to make the litigation as expensive as possible, with a view to making certain the earning of a sufficient amount to pay their salaries. The compensation of the officers of the court and the fees charged ought to be entirely separate considerations. The losses which the Government may have to suffer through the lack of energy in the collection of costs and fees should be remedied in some other way. The salaries of the court officers should be fixed and should be paid out of the treasury of the county, state or national government, as the case may be, and fees should be reduced to as low a figure as possible con-

sistent with a reasonable discouragement of groundless and unnecessary litigation. I believe it is sufficiently in the interest of the public at large to promote equality between litigants, to take upon the government much more than has already been done, the burden of private litigation. What I have said has peculiar application to the Federal courts. The feeling with respect to their jurisdiction has been that limited as it is now to cases involving not less than \$2,000, the litigation must of course be between men better able to undergo its expense than in causes involving a less amount, and therefore that high fees and costs are not so objectionable in those courts as in the State courts. I think this has been a very unfortunate view and has been one of the several grounds for creating the prejudice that has undoubtedly existed in popular estimation against the Federal courts as rich men's courts. In those courts suits for damages for personal injury, of which many are there by removal of defendant, are generally brought by poor persons. Then the expense of litigation in patent cases is almost prohibitive for a poor inventor. It forces him into contracts that largely deprive him of the benefit of his invention. In respect to patent cases much might be done by the Supreme Courts reforming the equity procedure and the bill of costs.

I think another step in the direction of the dispatch of litigation would be the requirement of higher qualifications for those judges who sit to hear the cases, involving a small pecuniary amount. The system by which the justices of the peace who have to do with smaller cases are non-professional men and not apt in the disposition of business, is hardly a wise feature of the present system. The poor should have the benefit of as acute and able judges as the rich, and the money saved in the smaller salaries of the judges of the inferior courts is not an economy in the interest of the public. Under able, educated and well-paid judges who understand the purpose of the law in creating them, I am quite sure that the people's courts, as they are called, could be made much more effective than they are for the final settlement of controversies.

Another method by which the irritation at the inequalities in our administration of justice may be reduced is by the introduction of a system for the settling of damage suits brought by employes against public service corporations through official arbitration and without resort to jury trials. Such a system is

working in England, as I am informed. Under the statute, limitations are imposed upon the recovery of the employe or his representatives proportioned to his earning capacity. The hearing is prompt and the payment of the award equally prompt, and in this way a large mass of litigation that now blocks our courts would be taken out of our judicial tribunals, and be settled with dispatch. Of course it would not be proper or possible to prevent the plaintiff litigant from resorting to a jury trial if he chooses, but I believe that the result would be very largely to reduce the character of such litigation. The truth is that these suits for damages for injuries to employes and passengers and to trespassers and licensees have grown to be such a very large part of the litigation in each court, both in courts of first instance and in courts of appeal, and involve so much time because of the necessity for a jury trial, that they may be properly treated as a class and special statutory provision for their settlement by arbitration or otherwise be made. These are the cases which create most irritation against the courts among the poor. This is peculiarly true in such cases in the Federal courts. •

No one can have sat upon the Federal bench as I did for eight or nine years and not realize how defective the administration of justice in these cases must have seemed to the defeated plaintiff, whether he was the legless or armless employe himself or his personal representative. A non-resident railway corporation had removed the case which had been brought in the local court of the county in which the injured employe lived, to the Federal court, held, it may be, at a town forty or one hundred miles away. To this place at great expense the plaintiff was obliged to carry his witnesses. The case came on for trial, the evidence was produced and under the strict Federal rule as to contributory negligence or as to non-liability for the negligence of fellow servants, the judge was obliged to direct the jury to return a verdict for the defendant. Then the plaintiff's lawyer had to explain to him that if he had been able to remain in the State court, a different rule of liability of the company would have obtained, and he would have recovered a verdict. How could a litigant thus defeated, after incurring the heavy expenses incident to litigation in the Federal court, with nothing to show for it, have any other feeling than that the Federal courts were instruments of injustice and not justice, and that they were organized to defend corporations and not to help the poor to their rights? I am glad to be able to say that under the interstate commerce

employers' liability act much of this occasion for bitterness against the Federal courts and their administration of justice will be removed, and I believe it would greatly add to the popular confidence in the Federal courts if a Federal statute were enacted, by which, under proper limitations, official arbitration could be provided for settling the awards to employes in such cases arising in the carrying on of interstate commerce. We cannot, of course, dispense with the jury system. It is that which makes the people a part of the administration of justice and prevents the possibility of government oppression, but every means by which in civil cases litigants may be induced voluntarily to avoid the expense, delay and burden of jury trials ought to be encouraged, because in this way the general administration of justice can be greatly facilitated and the expense incident to delay in litigation can be greatly reduced.

I listened with professional pride yesterday, as every lawyer must have done, to the deserved encomiums which Senator Lindsay paid to the members of our profession and their willing sacrifices in every crisis in our country's history. Certainly no one has a profounder admiration than I have for the important part which the members of our profession must play in making a permanent success of self-government. I venture to suggest, however, that in respect to these details of our profession, these technicalities out of which can grow real abuses, there is sometimes a disposition on the part of the members of our profession to treat litigants as made for the courts and the lawyers, and not the courts and lawyers as made for litigants. As it is, lawyers who in judicial committees of the legislature, draft the codes of procedure, there is not as strong an impelling force as there ought to be to make the final disposition of cases as short as possible.

There is a story among the traditions of our Ohio Bar that a Mr. Nash, who had written a book generally used to aid practitioners in Ohio before the adoption of the code of procedure in 1851, was very indignant at the enactment of that new measure, and he severely condemned it. He said that the code was a barbarous arrangement under which a suit could be brought against one man, judgment taken against another and an execution issued upon that judgment against any good man in the State of Ohio. Now our profession is naturally conservative. It is our natural disposition to have things done in an orderly way and to believe that the way in

which things have been done should not be departed from until we clearly see an opportunity for improvement. I do not object to this spirit. Especially in this country, I think there will be progressive movements sufficient to prevent such conservatism from being a real obstruction to our general progress. I venture to think, however, that in the matter of procedure and in the adoption of special methods and systems for the settling of classes of controversies, we ought to be careful that this professional conservatism does not keep us, with the power that we necessarily exercise in respect to technical legal legislation, from adopting the reforms which are in the interest of equalizing the administration of justice as far as possible between the rich and the poor.

William H. Taft.